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No. 95-1195

In the Supreme Court of the United States

OCTOBER TERM, 1995

JONI WHITMORE, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether petitioners have standing to challenge the constitutionality of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, on the ground that it does not prohibit contributions to congressional candidates from citizens outside the candidates' congressional district.

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OPINIONS BELOW

The October 26, 1995, opinion of the court of appeals, as amended per the court's January 10, 1996, order (Pet. App. 1-18), is reported at 68 F.3d 1212. The opinion of the district court (Pet. App. 19-40) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1995. The petition for a writ of certiorari was filed on January 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Election Campaign Act (FECA) of 1971, 2 U.S.C. 431 *et seq.*, primarily in order to "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley* v. *Valeo*, 424 U.S. 1, 26 (1976). Congress achieved that goal chiefly by limiting the amount of money that any individual or political committee may contribute to a candidate for federal office or to a political committee. 2 U.S.C. 441a. That limitation "focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free * * * to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Buckley* v. *Valeo*, 424 U.S. at 28. This Court has held that the FECA's specific limitations on the size of campaign contributions serve the compelling governmental purpose of preventing the "actuality and appearance of corruption" without unnecessary infringement of First Amendment rights. 424 U.S. at 26.[1]

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[1] The Court in *Buckley* also upheld the FECA's reporting requirements. 424 U.S. at 66-68. The Court struck down provisions of the FECA that limited expenditures by candidates from their own personal funds, limited total expenditures by candidates on their campaigns, and limited the amount of independent expenditures. The Court also found the FEC's composition to violate the Appointments Clause with regard to the Commission's exercise of enforcement and rulemaking powers. In 1976, Congress amended the FECA to remedy the constitutional infirmities identified in the *Buckley* decision.

As relevant here, the FECA (1) places dollar limitations on the size of contributions by individuals and multicandidate political committees to candidates for federal office and their political committees, 2 U.S.C. 441a(a); (2) prohibits congressional campaign contributions by national banks, corporations, and labor organizations, 2 U.S.C. 441b(a); (3) prohibits political contributions by certain government contractors, 2 U.S.C. 441c(a); (4) prohibits contributions by foreign nationals, 2 U.S.C. 441e; (5) prohibits a person from making a contribution in the name of another, 2 U.S.C. 441f; and (6) limits the size of contributions made in cash, 2 U.S.C. 441g. The FECA neither requires candidates and their committees to accept, nor prohibits them from accepting, contributions from persons residing outside the district from which a candidate seeks election.

Respondent Federal Election Commission (FEC or Commission) is an independent federal agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, and 437g. Congress has authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1), to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2), to initiate civil actions in the federal courts to obtain judicial enforcement of the Act, 2 U.S.C. 437c(b)(1) and 437d(e), and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h.

2. Petitioner Joni Whitmore was the Green Party's candidate in the 1994 congressional election

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See Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101(a), 90 Stat. 475.

for Alaska's single seat in the United States House of Representatives. Pet. App. 6. In her campaign for office, Whitmore chose not to solicit or accept contributions from contributors residing outside of Alaska's congressional district. *Id.* at 72-73. Petitioner James Quinlan is an Alaska resident and a registered voter. *Id.* at 7. On June 30, 1994, petitioners filed this action against the FEC and the Republican and Democratic Party candidates for Alaska's congressional district, along with those candidates' principal campaign committees (collectively, the candidate respondents). *Id.* at 41-92. In their complaint, petitioners alleged that unspecified provisions of the FECA violate Article I and the First and Fifth Amendments to the Constitution by "authorizing" non-Alaskans, either individually or through multicandidate political committees, to make campaign contributions to candidates for Alaska's seat in the House of Representatives. Pet App. 41-42, 69.

Whitmore alleged that the "campaign finance system" (Pet App. 68) established by the Act injured her, as a candidate for Alaska's congressional seat, because her opponents' expenditure of contributions from non-Alaskans to finance communications with Alaska's voters would "preclude any possibility of [her] winning election" (*id.* at 45) and would "drown out" her communications with Alaska's voters. *Id.* at 74. She further alleged that the Act violated her Fifth Amendment right to equal protection by discriminating between two "classes" of candidates—those who receive contributions from non-Alaskans and those who do not. Pet App. 86.

Both Whitmore and Quinlan alleged that the Act injured them as residents of, and registered voters in,

Alaska's congressional district. They alleged that the expenditure by the candidate respondents of contributions from non-Alaskans infringed petitioners' First Amendment right of political association with other Alaska voters (Pet. App. 78-80), and deprived them of their right to a House of Representatives that is "republican in form." *Id.* at 81.[2]

Quinlan alleged in addition that his right to vote for Alaska's representative "embodies the right * * * to have an ability to influence the legislative acts of members of the United States House of Representatives that is equal to, and the same as, the influence [of] every other registered voter in the United States." Pet. App. 82. He asserted that the FECA violates this purported right by discriminating in favor of voters who influence members of the House by both voting in their own congressional districts and making or withholding campaign contributions to candidates in other congressional districts. *Id.* at 82-85.[3]

In their complaint, petitioners sought a declaratory judgment:

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[2] The complaint describes a House of Representatives that is "republican in form" as one in which the person elected as Alaska's representative "is exclusively dependent for his or her election and reelection on registered voters who reside in Alaska[] * * * and is exclusively accountable to such voters for his or her legislative acts." Pet. App. 80.

[3] Quinlan purported to assert this claim on his own behalf and on behalf of all registered voters in Alaska who do not make campaign contributions. Pet. App. 49-51. The district court did not certify the case as a class action, and petitioners did not challenge that determination on appeal. *Id.* at 8. The complaint also includes a fifth claim (*id.* at 88-89), directed solely toward the candidate respondents. We do not address that claim.

> [T]hat to the extent the [FECA] authorizes candidates seeking election as Alaska's representative in the United States House of Representatives, and their principal campaign and other authorized committees, to solicit and accept campaign contributions made * * * by persons who are not residents of Alaska's at-large congressional election district, and to finance campaign-related communications with registered voters who reside in such district with monies derived from such contributions, the Act violates Article I and the First and Fifth Amendments of the United States Constitution.

Pet. App. 91. They also sought a permanent injunction prohibiting the candidate respondents from soliciting or accepting campaign contributions from persons who are not residents of Alaska's at-large congressional election district. *Id.* at 92.

Petitioners invoked the district court's jurisdiction under both 28 U.S.C. 1331 and 2 U.S.C. 437h—a provision of the FECA that permits certification of questions regarding the constitutionality of provisions of the FECA to the court of appeals, Pet. App. 42, "which shall hear the matter sitting en banc."[4]

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[4] Section 437h provides:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the

2 U.S.C. 437h. Pursuant to Section 437h, petitioners requested that the district court certify their constitutional claims to the en banc court of appeals. Pet App. 90.

3. The district court refused to certify petitioners' proffered constitutional questions to the court of appeals, and on December 8, 1994, the court dismissed the complaint for lack of standing.[5] Pet. App. 19-40. The court held that petitioners had failed to allege facts demonstrating the Article III requirements of injury in fact, causation, and redressability, as required by this Court's standing cases. Pet. App. 26 (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

The court found petitioners' alleged injury to be inadequate to satisfy Article III because, among other things, "the [FECA] itself does not affect the ability of a candidate to campaign or to seek contributions for that campaign from any individual." Pet. App. 33-34. Similarly, petitioners failed to show that their alleged injuries were "fairly traceable to the challenged action of the defendant, and not the result of some third party" (*id.* at 37, quoting *Lujan*, 504 U.S. at 560), because the complaint "alleges no facts indicating that * * * government action has either caused non-Alaskans to contribute to [Whitmore's] opponents, prevented her from soliciting such contri-

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circuit involved, which shall hear the matter sitting en banc.

2 U.S.C. 437h.

[5] The court had earlier dismissed petitioners' claims against two unsuccessful primary candidates and those candidates' political committees, and had denied petitioners' motion for a preliminary injunction. See Pet. App. 21.

butions, or prevented non-Alaskans from contributing to her." Pet App. 37-38. Finally, the court held that the redressability requirement was not met because declaring the FECA unconstitutional would not stop out-of-state political contributions, and "because the effect of [such] contributions is wholly speculative." *Id.* at 39.

4. The court of appeals affirmed. The court held that a district court's failure to certify constitutional questions under Section 437h of the FECA is not error where a plaintiff lacks standing or raises frivolous claims. Pet. App. 10 (citing *California Medical Ass'n* v. *FEC*, 453 U.S. 182, 193 n.14 (1981)). Here, petitioners' case suffered from both defects. Pet. App. 11, 14, 18.

Observing that "[t]he Act neither prohibits nor authorizes out-of-state campaign contributions" (Pet. App. 12), and that "[t]he harms alleged [by petitioners] derive from the acts of other citizens, not from the Act" (*id.* at 14), the court concluded that "[t]he absence of a causal relationship between the Act, which [petitioners] challenge, and their injury, necessarily deprives them of standing to challenge the Act." *Id.* at 12-13.[6]

The court also held that petitioners' claims were legally frivolous. Pet. App. 15. Noting that petitioners cited no published judicial authority in support of their legal theory (*ibid.*), and that the relief petitioners sought—enjoining the acceptance of donations from out-of-state contributors who are not parties to the litigation—might abridge the rights of

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[6] Because the court held that petitioners had failed to satisfy the causation requirement, it did not address the other criteria for standing under Article III. Pet. App. 13.

third parties (*id.* at 17), the court found petitioners' claims to be untenable.

ARGUMENT

1. In order to establish standing, a plaintiff must show (1) an "injury in fact" that is "concrete and particularized," not "conjectural" or "hypothetical"; (2) that there is a "causal connection between the injury and the conduct complained of"; and (3) that it is "likely," as opposed to "merely speculative," that the injury will be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotations marks and citations omitted). See also *United States* v. *Hays*, 115 S. Ct. 2431, 2435 (1995); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). The court below correctly held that petitioners could not demonstrate causation under Article III.

Assuming, *arguendo*, that petitioners satisfied the injury-in-fact requirement by alleging that out-of-state contributions diminished Whitmore's ability to compete against the candidate respondents, petitioners have failed to allege that any provision of the FECA caused that result. See *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973).[7] Rather, it is evident from the face of the complaint (see, *e.g.*, Pet. App. 71-73) that the alleged electoral disadvantage to petitioners sprang from the private decisions of non-Alaskans to support the candidate respondents, and from petitioner Whitmore's decision not to seek or accept such

[7] Petitioners fail to identify any particular provision of the FECA that they contend violates the Constitution. Instead, they rely on the conclusory allegation that "the operation of the FECA campaign finance system violates the petitioners' exercise of [First and Fifth Amendment] rights." Pet. 10; see also *id.* at 16.

support. Accordingly, petitioners have not alleged facts showing that their purported injury is "fairly traceable to the challenged action of the defendant, and not the result of some third party." *Lujan*, 504 U.S. at 560-561 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

Petitioners contend (Pet. 17-18) that, because the FECA regulates the amount and form of certain campaign contributions (whether from intradistrict or extradistrict sources), it affirmatively authorizes contributions by donors residing outside of a candidate's district. As the court of appeals observed (Pet. App. 12), however, that contention rests on the incorrect premise that a statute necessarily authorizes or requires all private action that it does not affirmatively prohibit. See *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 164-165 (1978) (private conduct does not become unconstitutional governmental action "by the simple device of characterizing the [government's] inaction as 'authorization' or 'encouragement.'"). The FECA neither requires candidates to accept, nor prohibits them from accepting, out-of-state contributions. See *Albanese* v. *FEC*, No. 95-6099, 1996 WL 115382 (2d Cir. Mar. 12, 1996), slip op. 2188.[8] Nor would such

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[8] In *Albanese*, the court followed the decision below in rejecting on standing grounds a constitutional challenge to the FECA. The court in *Albanese* concluded that, because the "FECA does not require that contributions be made to any candidate * * *, any injury claimed by these plaintiffs is not attributable to [the] FECA." Slip op. 2188. See also *Froelich* v. *FEC*, 855 F. Supp. 868 (E.D. Va. 1994) (dismissing for lack of standing complaint that challenged out-of-state campaign contributions under Article I, Article V, the Seventeenth Amendment, and the Separation of Powers doctrine), aff'd, 57 F.3d 1066 (4th Cir. 1995).

contributions be prohibited in the absence of the FECA. *Id.* at 2-3; see also *California Medical Ass'n* v. *FEC*, 641 F.2d 619, 623 n.2 (9th Cir. 1980) (en banc) (contributions by individuals to political committees were not limited before passage of the FECA), aff'd, 453 U.S. 182 (1981). The court below thus concluded (Pet. App. 14) that "[t]he harms alleged [by petitioners] derive from the acts of other citizens, not from the Act."

Petitioners also complain (Pet. 24-25) that "[t]he methodology the Court of Appeals employed to discern the intent of Congress embodied in [the] FECA so far departed from the accepted and usual course of judicial proceedings that this Court's review [is warranted]." The court below, however, looked directly to the text of the FECA (see, *e.g.*, Pet. App. 11-12), which clearly does not regulate the location within the United States from which a campaign contribution may be made. "[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); see also *Demarest* v. *Manspeaker*, 498 U.S. 184, 187 (1991); *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 495 U.S. 552, 557-558 (1990). Petitioners identify no "extraordinary circumstances" that would justify a departure from established rules of statutory construction in this case.[9]

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[9] Petitioners rely primarily (Pet. 24) on a 1974 legislative report, S. Rep. No. 689, 93d Cong., 2d Sess. 1, to argue that Congress intended the FECA completely to control campaign contributions and expenditures. Congress, however, did not adopt the provisions for public financing of congressional elections that were proposed by that report. The report's

2. Petitioners contend that review should be granted because the court of appeals "gratuitous[ly] pronounce[d]" their claims to be frivolous and thereby rendered a forbidden "advisory opinion[]." Pet. 25. The question whether petitioners' constitutional claims are frivolous was, however, properly before the court of appeals, see Gov't C.A. Br. 2, 31-34, and the court's decision to address that question in the alternative does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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proposed limit on campaign expenditures, which Congress did enact, was invalidated by this Court in *Buckley* v. *Valeo*, 424 U.S. at 54-58, and deleted from the Act by Congress in 1976. See Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101(a), 90 Stat. 475.